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The Pending Maritime Delimitations between Spain and Morocco: Sovereignty, Status and Feasibility

Eduardo JIMÉNEZ PINEDA*

Abstract

The pending maritime delimitations between Spain and Morocco are highly complex and noteworthy due to the existence of diverse factors, namely the particularity that the delimitations shall be conducted in two different seas: the Alboran Sea and the Atlantic Ocean. Moreover, various sovereignty issues must be addressed, such as the Spanish enclaves in North Africa, which are claimed by Morocco generating maritime entitlements, and the Western Sahara dispute and Morocco's intention to include the Western Sahara maritime areas under its jurisdiction. In terms of the latter issue, this article studies the fisheries agreements concluded between the European Union and Morocco and the recent decisions given by the Court of Justice of the European Union, declaring those agreements prohibited under international law in respect of Western Sahara waters. Other significant matters analyzed are the views of both countries, the existence of several overlapping maritime claims with third States and the negotiations that have been carried out thus far to reach an agreement delimiting the maritime boundaries. On this subject, it is crucial to determine whether a tacit agreement exists – on the basis of the hydrocarbon activities licensed by Spain and Morocco – establishing the maritime boundary between the Canary Islands and Morocco's Atlantic coast. For this purpose, the findings of recent international jurisprudence, particularly the judgement given by ITLOS on the Ghana/Côte d'Ivoire case, are considered.

Keywords: maritime delimitation, Alboran Sea, Atlantic Ocean, Spanish enclaves, Western Sahara waters, tacit delimitation agreement

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1. Introduction

Maritime delimitation – understood as the ‘body of rules that regulates the drawing of boundaries between the overlapping maritime entitlements of neighbouring coastal States’¹ – holds a significant position in the Law of the Sea. The international courts and tribunals have played a key role in its emergence by developing the three-stage method to delimit the different maritime areas (territorial sea, contiguous zone, exclusive economic zone and continental shelf). The method consists of first

* Corresponding author details: Eduardo Jiménez Pineda (eduardo.jimenez.pineda@uco.es) is a PhD candidate, funded by an FPU Scholarship (ref. FPU16/03446) from the Spanish Ministry of Education, and an Assistant Professor of Public International Law at the University of Córdoba (Spain). This article is part of the author's contribution to the ITLOS where he was a 2017/2018 Nippon Fellow. The views expressed in the article in no way represent the positions either of the Nippon Foundation or those of the University of Córdoba. The author is deeply grateful to his mentors (Professor Rafael Casado Raigón and Professor Miguel García García-Revillo), his supervisors at ITLOS (Yara Saab and Matthias Fueracker), and to Nigel Browne, for his language assistance, and the editorial team for their patient and helpful feedback.

1 Stephen Fietta and Robin Cleverly, *A practitioner's guide to maritime boundary delimitation* (OUP 2016) 3.



drawing a provisional median line; second, adjusting that line in accordance with the relevant circumstances (if applicable, examples include the coastal configuration, the cut-off effect, the presence of islands, geographic factors, or the presence of third States); and, thirdly, the disproportionality test. This approach has been consolidated and accepted by the international adjudicating bodies as the appropriate method for dealing with maritime delimitation cases.²

In this context, the pending maritime delimitations between Spain and Morocco, which include all the overlapping maritime areas between the two countries since they have not yet delimited any of their maritime boundaries, are of particular interest due to the two different areas where the delimitations have to be made (i.e. the Alboran Sea and the Atlantic Ocean), the existence of hydrocarbon and fishing resources in these areas, and the presence of several relevant aspects of international law, primarily sovereignty issues. By the same token, an analysis of the possible achievement of a tacit agreement between Spain and Morocco on their maritime boundary in the Atlantic Ocean, based on the hydrocarbon practice, is highly engaging from a legal perspective.

The mentioned aspects, among others, are analysed in this article, the main purpose of which is to provide an overview of the maritime delimitation situation between Spain and Morocco in light of the applicable international law (in particular, the United Nations Convention on the Law of the Sea, hereinafter UNCLOS), the respective national legislation, and international jurisprudence in this field.

2. The situation in the Alboran Sea

The maritime delimitation between Spain and Morocco in the Alboran Sea is particularly complex due to the existence of Morocco's sovereignty claims over five Spanish territories in North Africa. Moreover, both States have argued for a different method of delimitation, namely the equidistance line (on the part of Spain) and the equitable principles (on the part of Morocco).³ This section will address the sovereignty issues (2.1), the repercussions of those issues for maritime delimitation (2.2), the situation in the Strait of Gibraltar (2.3), and the delimitation negotiations and some considerations about the potential alternatives (2.4).

2.1 Sovereignty issues and maritime entitlements

Both Morocco and Spain claim sovereignty over five territories in North Africa, namely: Ceuta, Melilla, Vélez de la Gomera, Alhucemas and the Chafarinas Islands. Spain puts forth strong arguments justifying its sovereignty over these territories, which, as a consequence of being integral components of the Spanish State, were not included on the list of non-autonomous territories drawn up

² See Alex G Oude Elferink, Tore Henriksen and Signe Veierud Busch, *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?* (CUP 2018).

³ Rafael Casado Raigón and Víctor Luis Gutiérrez Castillo, 'Maroc et l'Espagne la délimitation de leurs espaces maritimes' (2001) VI *Annuaire du Droit de la Mer* 195, 196-97.



by the United Nations (UN) in 1947.⁴ Concretely, Spain alleges the right of conquest, the *terra nullis* principle, longevity of occupation, national security reasons, and the 'territorial integrity of the State' principle.⁵ However, despite such arguments, Morocco contends that it ought to be the sovereign State of the territories on the basis of the UN principle of decolonization, the threat to Morocco's national security, the obstruction to its economic and political independence, as well as the territorial integrity principle.⁶ In light of the aforementioned arguments, it is important to note that Spain achieved international recognition of its sovereignty over the five territories by the Anglo-French Declaration in 1904. Nevertheless, Morocco, which achieved independence from France in 1956, rejects the binding effect of this Declaration because, like most of the new States resulting from the decolonization process, it considers the treaties signed during the colonial period to be non-binding in the post-colonial context.⁷

The different conceptions about sovereignty over the five territories claimed by Morocco have led to a number of potential disputes between the countries⁸ – two of which clearly relate to maritime delimitation. The first dispute is State jurisdiction over the maritime entitlements generated by the five territories as a consequence of their coastal character.⁹ Indeed, this is one of the most determinant factors preventing an agreement from being reached on the maritime boundaries of the two States since they disagree on a crucial element of this operation. The second dispute is the controversial aspects of the fisheries agreements that Spain and the European Union (EU) entered into with Morocco as a result of the uncertain limits of each State's jurisdiction.¹⁰

By the same token, another disputed territory between Spain and Morocco relevant for maritime delimitation purposes is Perejil Island (called 'Laila' by the Moroccans), located in the Strait of Gi-

4 The United Nations and Decolonization, 'UN Non-Self-Governing Territories', <www.un.org/en/decolonization/non-selfgovterritories.shtml> accessed 15 June 2018.

5 Gerry O'Reilly, 'Ceuta and the Spanish Sovereign Territories: Spanish and Moroccan Claims' (1994) 1(2) BTB 1, 9-10.

6 José Antonio Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales* (9th edn, Tecnos 2003) 264-65; Saïd Ihrari, 'Le contentieux Maroc-Espagnol en matière de délimitation maritime' (2002) VII *Annuaire du Droit de la Mer* 199.

7 Julio González Campos, 'Las pretensiones de Marruecos sobre los territorios españoles en el Norte de África (1956-2002)' in Juan Domingo Torrejón Rodríguez (ed), *España y Marruecos en el centenario de la Conferencia de Algeciras* (Dykinson 2007) 82-84.

8 The potential disputes between the countries are: (1) the territorial dispute over the five territories in North Africa; (2) the lack of maritime delimitations; (3) the Western Sahara issue; (4) the economic cooperation and the exploitation of the resources, specially of fisheries; (5) the control by Morocco of irregular immigration; and (6) the national security and the different strategic interests: Alejandro Del Valle Gálvez, 'España-Marruecos: una relación bilateral de alto potencial conflictivo, condicionada por la Unión Europea-Panorama con propuestas' (2007) 14 REEI *passim* 4-9 <www.reei.org/index.php/revista/num14/articulos/espana-marruecos-una-relacion-bilateral-alto-potencial-conflictivo-condicionada-union-europea-panorama-con-propuestas> accessed 21 June 2018.

9 Gil Carlos Rodríguez Iglesias, 'Spain: Dependent Territories', *Encyclopedia of Public International Law IV* (2000) 565-67.

10 Carlos Ruiz Miguel, 'Las fronteras marítimas hispano-marroquíes desde el Derecho Internacional' (2004) 302 *Grupo de Estudios Estratégicos* <<http://gees.org/articulos/las-fronteras-maritimas-hispano-marroquies-desde-el-derecho-internacional>> accessed 18 June 2018.



braltar very close to Ceuta.¹¹ However, this territory is not traditionally included in the group of five territories claimed by Morocco, which considers Perejil Island as belonging to Morocco since 1956.¹² In this sense, a clarification must be made: in accordance with Article 121 UNCLOS, this feature cannot be considered an *island*, but rather a *rock* since it ‘cannot sustain human habitation or economic life of its own’.¹³ Nowadays, the status of this small rock has not yet been resolved and a special regimen of non-occupation is followed.¹⁴ In a nutshell, Spanish sovereignty over this rock is doubtful, but Spain still has stronger arguments for affirming sovereignty than Morocco – mainly, the cession of Perejil from Portugal to Spain in 1581, Spain’s certified presence in the rock since 1746, and the construction by Spain of a lighthouse in 1887; by comparison, Morocco’s argument basically relies on the proximity of Perejil Island to the Moroccan coast (less than 200 metres) in addition to the need to fight against illicit traffic in narcotic drugs and not any title of possession.¹⁵

In this context, due to Morocco’s ‘advanced status’ in relation to the EU,¹⁶ the various maritime conflicts between Spain and Morocco can be partially dealt with and defused within the larger framework of EU relations.¹⁷ In particular, a number of negative consequences resulting from the unresolved conflicts and tensions between the two countries, such as the lack of an agreed maritime boundary, have been tempered by EU action in the domains in which it enjoys exclusive or shared competence. As an example, concerning fisheries, the absent maritime delimitation between the two countries is tempered by the conclusion of fisheries agreements between the EU and Morocco. Thus, despite the States’ distinct views on sovereignty over those enclaves, which have repercussions for maritime delimitation, the likelihood of disputes between Spain and Morocco arising from the absence of delimited maritime boundaries are reduced thanks to the common interest in cooperation and Spain’s limited ability to take an autonomous position on account of EU competence in these areas.

11 The different understandings about sovereignty over the Perejil Island even caused one of the biggest diplomatic incidents between the two countries in recent years: in 2002, a group of six Moroccan officials took the rock for, supposedly, maritime control of the illegal drugs traffic and, a week later, the Spanish army recovered the rock and arrested the six Moroccan officials. See Richard Gillespie, ‘“This Stupid Little Island”: A Neighbourhood Confrontation in the Western Mediterranean’ (2006) 43 IP 110.

12 Romualdo Bermejo García, ‘Algunas cuestiones jurídicas en torno al islote del Perejil’ (2002) 25 Análisis del Real Instituto Elcano <http://biblioteca.ribei.org/96/1/Algunas_cuestiones_jur%C3%ADdicas_en_torno_al_islote_del_Perejil_-_Elcano.pdf> accessed 15 October 2018.

13 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art 121, para 3.

14 Djamila Chikhi, ‘Les relations hispano-marocaines à l’épreuve de la crise Persil-Leila’ (2003) 1 PESI 91.

15 Jaume Saura Estapà, ‘A propósito de la soberanía sobre el islote de Perejil’ (2002) 5 REEI 1-5 <<http://www.reei.org/index.php/revista/num5/agora/proposito-soberania-sobre-islote-perejil>> accessed 15 October 2018.

16 Morocco has had advanced status with the EU since 2008, the objectives of which are ‘to strengthen dialogue and cooperation in the areas of politics and security’, ‘to progressively integrate Morocco into the EU internal market through legislative and regulatory convergence’, and ‘to extend the partnership to include new participants’: European Union External Action, ‘Morocco and the EU’ (10 May 2016) <https://eeas.europa.eu/generic-warning-system-taxonomy/404_en/4347/Morocco%20and%20the%20EU> accessed 15 October 2018.

17 Del Valle Gálvez, ‘España-Marruecos: una relación bilateral...’ (n 8) 9-10.



2.2 Status of the delimitation

The status of the delimitations between Spain and Morocco in the Alboran Sea is a consequence of the different perspectives argued by the two countries. On the one hand, Spain has not declared an exclusive economic zone (EEZ) in the Alboran Sea. In this regard, Royal Decree 236/2013, which follows the equidistance method, declared an EEZ for Spain in the north-western Mediterranean excluding the Alboran Sea. On the other hand, Morocco has drawn 14 straight baselines in the Alboran Sea enclosing the Spanish territories,¹⁸ thus cutting off even the territorial sea of Spain around those enclaves. Consequently, Spain officially protested Morocco's Decree regulating the Alboran Sea, which is considered an evident violation of Article 7 UNCLOS.¹⁹ Nonetheless, Morocco reaffirmed its position regarding the sovereignty over the five territories when it ratified the UNCLOS on 31 May 2007, declaring that

the laws and regulations relating to maritime areas in force in Morocco shall remain applicable without prejudice to the provisions of the United Nations Convention on the Law of the Sea. The Government of the Kingdom of Morocco *affirms once again that Sebta, Melilia, the islet of Al-Hoceima, the rock of Badis and the Chafarinas Islands are Moroccan territories. Morocco has never ceased to demand the recovery of these territories, which are under Spanish occupation, in order to achieve its territorial unity. On ratifying the Convention, the Government of the Kingdom of Morocco declares that ratification may in no way be interpreted as recognition of that occupation.*²⁰

Accordingly, Morocco followed the equidistance method for the territorial sea but not for the EEZ or the continental shelf, to which Morocco inconsistently invokes equity principles.

Paradoxically, in the declaration marking Spain's signature of the UNCLOS in 1984, Spain included similar provisions about its sovereignty over the waters surrounding Gibraltar. Hence, Spain stated in a declaration made after ratification of the Convention, on 19 July 2002, that 'it does not accept the procedures provided for in part XV, section 2, with respect to the settlement of disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles.'²¹ Furthermore, the delimitations between Spain and Morocco, which has not made any declaration in this respect, could be done by the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) or an arbitral tribunal if Spain would agree expressly with this point submitting the dispute by means of a special agreement. Consequently, the most feasible manner to carry out the delimitation is more likely through bilateral negotiations.

18 Morocco did this by way of Decree n° 2-75-311 du 21 July 1975, BORM n° 3276 13 August 1975.

19 UNCLOS art 7(6) establishes: 'The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.'

20 Declaration of Morocco upon ratification of UNCLOS (31 May 2007) <www.un.org/depts/los/convention_agreements/convention_declarations.htm#Morocco> accessed 20 June 2018 [emphasis added].

21 Declaration made by Spain after ratification of UNCLOS (19 July 2002) <www.un.org/depts/los/convention_agreements/convention_declarations.htm#Spain%20Upon%20ratification> accessed 20 June 2018.



The current status and regulation of the five territories have, logically, decisive effects for the maritime claims of both countries. Given that all five territories are coastal, they give rise to entitlements over the adjacent waters in accordance with the UNCLOS. To address the relevant delimitations, Professor Casado Raigón and Professor Gutiérrez Castillo propose that three different groupings can be distinguished, which depend on the distance to the coast: (1) the Chafarinas Islands, Vélez de la Gomera and Alhucemas; (2) the Alboran Islands, the only territory not claimed by Morocco; and (3) Ceuta and Melilla, which are located on the African continent and constitute the most important Spanish territories in North Africa.²² Even though a treaty between Spain and Morocco establishing their maritime boundaries seems impossible without first solving the sovereignty issues, the possible scenarios for each of the three groupings can nevertheless be analysed.

First, amongst the first group of islands, two of them – Vélez de la Gomera and Alhucemas – are uninhabited and situated very close to the Moroccan coast. However, ‘uninhabited’ does not necessarily mean ‘incapable to sustain human habitation’ in terms of Article 121(3) UNCLOS. On this matter, in the *Bangladesh/Myanmar* case,²³ ITLOS declared that ‘neither case law nor State practice indicates that there is a general rule concerning to be given to islands in maritime delimitation’ and ‘the effect to be given to islands in delimitation may differ, depending on whether the delimitation concerns the territorial sea or other maritime areas beyond it.’²⁴ Moreover, ‘while is not unprecedented in case law for islands subject to such treatment are usually “insignificant maritime features”.’²⁵ Therefore, the only maritime space that Spain could claim in applying Article 121(3) UNCLOS would be a territorial sea of 12 nautical miles (NM).²⁶ Nonetheless, the attribution of a territorial sea to these two islands could entail an inequitable result since they are surrounded by Morocco’s mainland territory that would otherwise be cut off. For these reasons, a feasible solution would be the attribution to these two maritime features of a limited territorial sea smaller than 12 NM.

With regard to the Chafarinas Islands,²⁷ the existence of a Spanish military base, their larger size, and the greater distance to the Moroccan coast in comparison with Vélez de la Gomera and Alhucemas could justify not only the territorial sea as in the previous case but also an EEZ and a continental shelf. However, the acknowledgement for these islands of an EEZ and a continental shelf could represent a major difficulty in completing the maritime delimitation. In this sense, some scholars have highlighted the inconvenience, in terms of equity, of joining the hypothetical Chafarinas Islands

22 Casado Raigón and Gutiérrez Castillo (n 3) 207-08.

23 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment of 14 March 2012) ITLOS Reports 2012, 4.

24 *ibid* paras 147-48.

25 *ibid* para 151.

26 In this sense, the ICJ declared in *Nicaragua v Colombia* that ‘a rock which is incapable of sustaining human habitation or economic life of its own under Article 121, paragraph 3, of UNCLOS, so this feature generates no entitlement to a continental shelf or exclusive economic zone’: *Territorial and maritime dispute (Nicaragua v Colombia)* (Judgement) [2012] ICJ Rep 693, para 183 *in fine*.

27 Jesús Verdú Baeza, ‘España en el norte de África. El caso de las islas Chafarinas’ (2014) 27 REEI <www.reei.org/index.php/revista/num27/notas/espana-norte-africa-caso-islas-chafarinas> accessed 20 June 2018.



continental shelf to the Spanish mainland continental shelf.²⁸ Indeed, this last position seems more reasonable because Morocco, due to the proximity of these islands to the Moroccan coast, would hardly agree to confer all the maritime areas that could be claimed by Spain in relation to those islands. Thus, it would be more equitable, and logical, to establish a territorial sea around these islands facing Morocco's coast, and a territorial sea, a contiguous zone and an EEZ facing the Spanish coast – concretely, in the Gulf of Almería. Accordingly, the maritime spaces of these islands would not be isolated by Morocco's waters and, at the same time, these three small islands would not produce an inequitable result that leaves Morocco with less maritime spaces than it is entitled to.

Concerning the second grouping, the location of the Alboran Islands is considerably different than the first group. In particular, these two small islands are almost in the equidistance line that could be drawn between Spain and Morocco in the Alboran Sea – specifically, five NM south of this hypothetical line.²⁹ Furthermore, taking into account that these islands are uninhabited and could hardly 'sustain human habitation or economic life of their own',³⁰ the 12 NM territorial sea that could be given to them would meet the Spanish mainland EEZ and continental shelf by the southern Spain area. Taking into account the closeness of these islands to the possible equidistance line and the fact that Morocco does not claim these islands, it is unlikely that a maritime boundary between Spain and Morocco will be drawn in the Alboran Sea that leaves the Alboran Islands out of Spanish mainland maritime zones as a whole.

Finally, regarding the third grouping, the scenario with Ceuta and Melilla is different from those mentioned above because these two Spanish territories in the north of Morocco are located on a mainland (although a different continent, i.e. Africa) and, as such, they can generate all the maritime areas allowed by international law. Regarding Ceuta, its maritime areas should be joined, northbound and in a north-westerly direction, to the Spanish maritime zones resulting from the Iberian Peninsula due to its closeness to the latter.³¹ In relation to Ceuta's maritime areas in the south-easterly and southbound direction, the maritime boundary should be drawn through an equidistance line considering the length of the Ceuta coastline as well. In the case of Melilla, its great distance from the Spanish coast in the Iberian Peninsula, in addition to the fact that it is completely surrounded by Morocco's coastal territories, make joining the two continental shelves more complex. Nevertheless, a hypothetical maritime delimitation between Spain and Morocco in the area around Melilla could be done by joining a narrow band of Melilla's EEZ and continental shelf in a north-easterly direction with the EEZ and continental shelf belonging to the Spanish territories located in the Iberian Peninsula. On the other hand, the rest of its territorial sea would limit Morocco's territorial sea and EEZ in the southward and northbound directions.³²

28 Casado Raigón and Gutiérrez Castillo (n 3) 209.

29 *ibid.*

30 As mentioned before, these are the terms used by UNCLOS art 121(3) for the rocks that are not entitled to an exclusive economic zone or continental shelf.

31 José Manuel Lacleta, 'Las aguas españolas en la costa africana' (2003) 7 REEI, 9-10 and 11-14 <www.reei.org/index.php/revista/num7/agora/aguas-espanolas-costa-africana> accessed 21 June 2018.

32 Casado Raigón and Gutiérrez Castillo (n 3) 210.



2.3 Impact on the Strait of Gibraltar

The previous discussion on the lack of delimitation in the Alboran Sea has consequences for the Strait of Gibraltar – one of the world’s most important straits in terms of international navigation.³³ In this sense, the Strait of Gibraltar is one of 120 straits in the world, of which 100 are covered by the territorial waters of the coastal States.³⁴ This is the case for the Strait of Gibraltar, which joins the Atlantic Ocean with the Mediterranean Sea and, as such, the high seas with the EEZ. For this kind of strait, Articles 37-44 UNCLOS establish the regimen of *transit passage*. In spite of the sovereign disputes between Spain and Morocco (and also the United Kingdom as the administering power over the Rock of Gibraltar³⁵) and the repercussions in the absence of maritime boundaries, the parties agree to the right of vessels to transit passage and cooperate closely with each other, and with the International Maritime Organization, to further the safety of maritime traffic in this area.³⁶ Regarding transit passage in UNCLOS, Morocco has not made any declarations or reservations; Spain has only made a declaration upon the ratification of the Convention, on 15 January 1997, understanding that ‘[t]he provisions laid down in Part III of the Convention are compatible with *the right of a coastal State to dictate and apply its own regulations in straits used for international navigation*, provided that this does not impede the right of transit passage.’³⁷

2.4 Negotiations at the high-level meetings and feasible solutions

With the aim of contributing to cooperation and a good relationship between Morocco and Spain, there are frequent high-level meetings between the two States, which are regulated by the *Treaty of friendship, good-neighbourliness and cooperation* between Spain and Morocco of 1991. The most recent 11th meeting took place in 2015;³⁸ while these meetings address issues going beyond maritime boundaries, due to the scope of this article, only the latter will be addressed here. For maritime delimitation purposes, it is important to note that both countries have been behaving recently in a

33 Ana Gemma López Martín, ‘Navigation through the Strait of Gibraltar’ 2017 21 SYBIL <www.sybil.es/archive/vol-21-2017/> accessed 21 June 2018.

34 Driss Dahak, ‘El régimen jurídico de los Estrechos’ (1982) II Coloquio internacional sobre la factibilidad de una comunicación fija a través del Estrecho de Gibraltar, 497.

35 Upon the accession to the UNCLOS, on 25 July 1997, the UK stated in relation to Gibraltar that ‘with regard to point 2 of the declaration made upon ratification of the Convention by the Government of Spain, the Government of the United Kingdom has no doubt about the sovereignty of the United Kingdom over Gibraltar, including its territorial waters. The Government of the United Kingdom, as the administering authority of Gibraltar, has extended the United Kingdom’s accession to the Convention and ratification of the Agreement to Gibraltar. The Government of the United Kingdom, therefore, rejects as unfounded point 2 of the Spanish declaration.’ UN Division for Ocean Affairs and the Law of the Sea, ‘Declarations and statements’ <www.un.org/depts/los/convention_agreements/convention_declarations.htm#UK%20Upon%20accession> accessed 21 June 2018. Pablo Antonio Fernández Sánchez, ‘La controversia sobre la titularidad jurídico-internacional de los espacios marítimos adyacentes a Gibraltar’ (2015) 67 REDI 13.

36 Rafael Casado Raigón, ‘Le détroit de Gibraltar’ in Rafael Casado Raigón (ed), *L’Europe et la mer: pêche, navigation et environnement marin* (Bruylant 2005).

37 Declaration of Spain upon ratification of UNCLOS (15 January 1997) <www.un.org/depts/los/convention_agreements/convention_declarations.htm#Spain%20Upon%20ratification> accessed 25 June 2018 [emphasis added].

38 Tratado de amistad, buena vecindad y cooperación entre el Reino de España y el Reino de Marruecos (concluded 4 July 1991) (BOE 49, 26 February 1993) <www.boe.es/buscar/doc.php?id=BOE-A-1993-5422> accessed 20 June 2018.



way that decreases the disputed aspects (particularly, the sovereignty issues explained above) and to cooperate as much as possible.³⁹ In this sense, the rapprochement of Spain to Morocco's stance on Western Sahara, consisting of the integration of an autonomous Western Sahara with Morocco and the new official position of Morocco postponing its historical sovereignty claims, have been very helpful.⁴⁰ Moreover, the aforementioned contribution of the EU has improved the relationships between the two countries.

Even though there were no talks on determining the maritime boundaries in the last high-level meeting between the two countries in 2015, these conversations have been conducted in previous meetings, namely those held in 2003 and 2005.⁴¹ The delimitation was likely not addressed in 2015 because of the recent (at the time) submission by Spain to the Commission on the Limits of the Continental Shelf (CLCS) for an extension of the continental shelf in the Canary Islands on 17 December 2014.⁴²

In light of the above, the early conclusion of an agreement between Spain and Morocco delimiting their maritime boundaries in the Alboran Sea is improbable. Having said that, the lack of a declaration by Spain of an EEZ in the Alboran Sea, in contrast to the Mediterranean,⁴³ may suggest a certain predisposition by Spain to negotiate these issues in the future. Regardless of when the negotiations for reaching an agreement will take place, Spain will safeguard the status of Ceuta and Melilla as integral parts of Spain given their historic Spanish heritage and as established in the administrative division of Spain made by the Spanish Constitution of 1978. Finally, we should not lose sight of either the political aspects that such negotiations bring about or the extremely sensitive sovereignty issues, as evidenced by the Perejil incident.⁴⁴

39 Juan Domingo Torrejón Rodríguez, 'La XI Reunión de Alto Nivel hispano-marroquí. Análisis y reflexiones sobre su contexto y sobre las materias discutidas en el ámbito del diálogo político' (2015) 3 PESI 213, 217.

40 On this point, the Spanish-Moroccan Joint Declaration (Madrid, 5 June 2015) after the meeting stated that 'concerning the Western Sahara issue, the two Parties are pleased for the adoption, in April 2015, of the 2218 Resolution by the United Nations Security Council. In this context, Spain recognises the serious and believable efforts of Morocco. Equally, the two Parties have reminded the importance of the resumption of negotiations on solid bases, according to resolutions and parameters clearly defined by the Security Council and have emphasised the spirit of compromise and realism to reach a consensual and mutually acceptable political solution.' The full text of the declaration, in its French original version that has been translated to English by the author, can be found at <www.exteriores.gob.es/Embajadas/RABAT/es/Noticias/Documents/D%C3%A9claration%20XI%20RAN.pdf> accessed on 20 June 2018. However, the two recent decisions of the CJEU (Case C-104/16 P, Judgment of 21 December 2016; Case C-266/16, Judgment of 27 February 2018, referred below) in addition to the even more recent change in the Spanish Government may bring a new position of Spain in this regard since those decisions seem rectify, according to international law, the previous pragmatic approach of Spain.

41 Those two joint declarations can be consulted in Alejandro del Valle Gálvez and Juan Domingo Torrejón Rodríguez, *España y Marruecos. Tratados, declaraciones y memorandos de entendimiento (1991-2013)* (UCA 2014) 295, 309.

42 Submission by the Kingdom of Spain to the Commission on the Limits of the Continental Shelf (17 December 2014) <www.un.org/depts/los/clcs_new/submissions_files/submission_esp_77_2014.htm> accessed 20 June 2018.

43 Spain declared an EEZ of 200 NM in the north-western Mediterranean (from the Cape of Gata to the equidistance line with the neighbouring riparian States) by Real Decreto 236/2013, 5 April 2013, BOE 17 April 2013 <www.boe.es/buscar/doc.php?id=BOE-A-2013-4049> accessed 21 June 2018.

44 See (n 11) above on the Perejil incident.



3. The pending maritime delimitation in the area between the Canary Islands and Morocco's Atlantic coast

In the Atlantic Ocean, the maritime delimitation between Spain and Morocco, at first sight, seems easier than in the Alboran Sea; in principle, Spain and Morocco need only establish the maritime boundary between the Canary Islands and Morocco's Atlantic coast.⁴⁵ In this sense, this delimitation does not initially present a lot of difficulties in the northern region, since there are no special circumstances and the coasts are opposite one another. Nevertheless, the delimitation is again hindered by a sovereignty issue, namely the Western Sahara and Morocco's claim to this territory, over which Morocco can be considered as the *de facto* administering power.

In the same vein, another significant aspect regarding the maritime delimitation in that part of the Atlantic Ocean is the presence of some Portuguese islands north of the Canary Islands and facing Morocco's Atlantic coast. Concretely, we are talking about the Savage Islands (*Islas Salvajes* in Spanish) and Madeira. The Savage Islands are located between the Canary Islands and Madeira – in particular, 80 NM north of the Canary Islands and 162 NM south of Madeira. Since the Spanish-Portuguese delimitation in this area is complicated,⁴⁶ and taking into account that this particular delimitation exceeds the scope of this article, the only concern relevant to the discussion at hand is that a hypothetical delimitation between Spain and Morocco north of the Canary Islands must be done on a trilateral level with Portugal aimed at respecting its maritime entitlements in that area.

In order to fully explain the situation of the pending maritime delimitations between Spain and Morocco in the Atlantic Ocean, this section will address some of the most important aspects, such as the Western Sahara issue (3.1), the hypothetical Canary Islands' archipelagic waters (3.2), Morocco's perspective regarding the delimitations (3.3), the negotiations carried out thus far between the two countries as well as the alleged tacit agreement about the maritime boundary (3.4), and an analysis of the relevant circumstances and the median line (3.5).

3.1 Western Sahara

First of all, the UN does not recognise either Spain or Morocco as the colonial power of Western Sahara, and it must be mentioned that a potential agreement establishing the maritime boundary with Western Sahara, according to international law, shall not be concluded with Morocco. In addition to the ICJ's Advisory Opinion of 16 October 1975 about Western Sahara,⁴⁷ the Court of Justice of the European Union (CJEU) pronounced in a recent 2016 judgment that 'the customary principle of self-determination ... is, as the International Court of Justice stated in paragraphs 54 to 56 of its Advisory Opinion on Western Sahara, a principle of international law applicable to all non-self-gov-

45 Casado Raigón and Gutiérrez Castillo (n 3) 210-11.

46 See *contra* Amparo Serrano, 'The new maritime map of Portugal and the case of the 'Salvajes' Islands' (2014) 28 REEI, 17-28 <www.reei.org/index.php/revista/num28/articulos/nuevo-mapa-maritimo-portugal-caso-islas-salvajes> accessed 21 June 2018.

47 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.



erning territories and to all peoples who have not yet achieved independence',⁴⁸ accordingly, 'that principle forms part of the rules of international law applicable to relations between the European Union and the Kingdom of Morocco'.⁴⁹ Moreover,

[i]n view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination, in relation to that of any State, including the Kingdom of Morocco, the words 'territory of the Kingdom of Morocco' set out in Article 94 of the Association Agreement cannot ... be interpreted in such a way that Western Sahara is included within the territorial scope of that agreement.⁵⁰

Prior to the CJEU's judgment of 21 December 2016, the *status quo* was the tacit acceptance by the EU (and consequently by Spain) of Morocco as the administering power and correct interlocutor to negotiate on the waters surrounding the Western Sahara coasts. As Professor Casado Raigón and Professor Gutiérrez Castillo argue, the conclusion of fisheries agreements between Morocco and the EU, including the sea to which Western Sahara is entitled, came to ratify this tendency.⁵¹

Notwithstanding this assertion, after the CJEU's judgment, the previous scenario ought to be called into question and Morocco can no longer be considered the correct representative of the interests of Western Sahara (the correct representative should be, presumably, the Front Polisario).⁵² In accordance with the UN General Assembly resolutions,⁵³ this colonised territory has the right to self-determination and, in the words of the EU Advocate General, the right that the '*exploitation* (of the Western Sahara natural resources) *is carried out for the benefit of the people of that territory*'.⁵⁴

In this line, on 27 February 2018, the CJEU issued its judgment in the *Western Sahara Campaign UK* case,⁵⁵ accepting the validity of the fisheries agreements between Morocco and the EU but declaring that the concept of 'territory of the Kingdom of Morocco'⁵⁶ 'must be construed as referring to the geographical area over which the Kingdom of Morocco exercises the fullness of the powers granted to sovereign entities by international law, to the exclusion of any other territory, such as that

48 Case C-104/16 P *Council v Front Polisario* [2016] ECR 973, para 88.

49 *ibid* para 89.

50 *ibid* para 92.

51 Casado Raigón and Gutiérrez Castillo (n 3) 212.

52 Markus W Gehring, 'Court of Justice further clarifies the application of the EU-Morocco Fisheries Partnership Agreement to Western Sahara' (*EU Law Analysis*, 1 March 2018) <<http://eulawanalysis.blogspot.com/2018/03/court-of-justice-further-clarifies.html>> accessed 29 August 2018.

53 Among others, the well-known Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by UNGA Res 1514 (XV) (14 December 1960), and Permanent sovereignty over natural resources, adopted by UNGA Res 1803 (XVII) (14 December 1962).

54 Case C-266/16 *Western Sahara Campaign UK* [2018] ECR I, Opinion of AG Melchior Wathelet, para 293 [emphasis added].

55 Case C-266/16 *Western Sahara Campaign UK* [2018] ECR 118.

56 *ibid* para 61.



of Western Sahara.⁵⁷ Consequently,

[i]f the territory of Western Sahara were to be included within the scope of the Association Agreement, that would be contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, stated in Article 1 of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention is a specific expression.⁵⁸

Therefore, ‘the territory of Western Sahara is not covered by the concept of “territory of Morocco” within the meaning of Article 11 of the Fisheries Partnership Agreement’;⁵⁹ hence, ‘the waters adjacent to the territory of Western Sahara are not covered by the expression “waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco”, in Article 2(a) of the Fisheries Partnership Agreement.’⁶⁰

Thus, the maritime delimitation between Spain and Morocco over the Western Sahara waters, located south of the Canary Islands, would be invalid because Morocco is not the lawful sovereign State of this territory. For this reason, a pragmatic approach would be to exclude negotiations about maritime delimitation over this area from the framework of the maritime delimitation negotiations between Spain and Morocco, since they would be, at least in regard to that area and legally speaking, prohibited under international law.

3.2 The archipelagic character of the Canary Islands and the Canaries Waters Law

The maritime delimitation between Spain and Morocco in the Atlantic Ocean must be made in the area between the Canary Islands and Morocco, rather than between the Spanish mainland coast and Morocco. This archipelago comprises seven main islands, all of which are inhabited: El Hierro, La Gomera, La Palma, Tenerife, Gran Canaria, Fuerteventura, and Lanzarote. Historically, these islands have belonged to Spain since the 15th century; hence, in contrast to the Spanish territories in North Africa, this is likely the reason why they are not claimed by Morocco despite its close proximity.

Article 46(b) UNCLOS, in relation to archipelagic States, establishes that “archipelago” means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such’. Accordingly, the Canary Islands should be entitled to the same rights as the *archipelagic States* in terms of baselines and internal waters in relation to their effect on maritime delimitation purposes, among

57 *ibid* para 62.

58 *ibid* para 63.

59 *ibid* para 64.

60 *ibid* para 73.



others.⁶¹ Nevertheless, the archipelagos of a State belonging to mixed States (as Spain is – not only because of the Canary Islands but also due to the Balearic Islands⁶²) cannot benefit from the provisions of Part IV UNCLOS. This has been confirmed by the ICJ in the *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain*, declaring that ‘the method of straight baselines is applicable only if the State has declared itself to be an archipelagic State under Part IV of the 1982 Convention on the Law of the Sea, which is not true of Bahrain in this case,’⁶³ and, more recently, by the arbitral tribunal in the *South China Sea Arbitration*.⁶⁴

Although international law prohibits Spain from delimiting the maritime areas surrounding the Canary Islands by drawing archipelagic baselines, Article 1 of Law 15/1978 of 20 February 1978 regarding the exclusive economic zone⁶⁵ establishes that ‘in the case of archipelagos, the outer limit of the economic zone will be measured from the straight baselines joining the external points of the islands and rocks by which they are respectively formed, so that the resulting perimeter follows the general configuration of each archipelago.’⁶⁶ This provision was further developed by Law 44/2010 of 30 December 2010 regarding the Canaries waters (Canaries Waters Law).⁶⁷ Strictly speaking, these archipelagic lines enclose an area with a proportion between land and water within the UNCLOS limits.⁶⁸ The significant timespan between these two laws (more than 30 years) shows the difficulties of gaining approval since Spain has always been aware of its contradiction, at least apparently, with international law.

61 Sean D Murphy, ‘International Law Relating to Islands’ in Académie de Droit International (ed), *Collected Courses 2016* (Brill 2017) 144-50.

62 The reasons for this unequal treatment can be found in the negotiations of the Third Conference, where the mixed States (e.g. Ecuador, India, Denmark or Norway) were not able to receive the same treatment. See Rafael Casado Raigón, *Derecho Internacional* (3rd edn, Tecnos 2017) 324; José Antonio de Yturriaga Barberán, ‘Ámbitos de soberanía en la Convención de las Naciones Unidas sobre el Derecho del mar: una perspectiva española’ (Ministerio de Asuntos Exteriores 1993) 408 ss; Carlos Jiménez Piernas, ‘Incidencia del principio archipelágico en la problemática marítima y autonómica de Canarias’ (1981) 33 REDI 523.

63 *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits) (Judgement) [2001] ICJ Rep 103, para 214.

64 *South China Sea Arbitration (Philippines v China)* (PCA 2016) Award of 12 July 2016, Case No. 2013-19 237, para 575.

65 Ley 15/1978, de 20 de febrero, sobre zona económica, BOE num 46, 23 February 1978 <www.boe.es/buscar/act.php?id=BOE-A-1978-5340> accessed 20 June 2018.

66 Translation by the author.

67 Ley 44/2010, de 30 de diciembre, de aguas canarias, BOE num 318, 31 December 2010 <www.boe.es/diario_boe/txt.php?id=BOE-A-2010-20140> accessed 21 June 2018.

68 Esperanza Orhuela Calatayud, ‘La delimitación de los espacios marinos en los archipiélagos de Estado: Reflexiones a la luz de la ley 44/2010, de 30 de diciembre de aguas canarias’ (2011) 21 REEI, 14 <www.reei.org/index.php/revista/num21/articulos/delimitacion-espacios-marinos-archipiélagos-estado-reflexiones-luz-ley-442010-30-diciembre-aguas-canarias> accessed 21 June 2018.



Analysing further the content of the Canaries Waters Law,⁶⁹ it establishes that

between the external points of the islands and rocks that ... integrate the Canary Archipelago, a perimeter contour will be drawn following the general configuration of the archipelago, according to the Annex of this Law. The waters inside this perimeter contour will be called Canaries waters and constitute the special maritime area of the Canary Autonomous Community.⁷⁰

From this provision, the use of the expression 'Canaries waters' instead of inter-island or archipelagic waters to refer to the waters enclosed by those archipelagic baselines stands out. In addition, its *Disposición Adicional Única* (i.e. additional disposition) declares that 'the drawing of the perimeter contour will not modify the delimitation of the maritime areas of the Canary Islands according to the way in which they are established by the Spanish legal system in virtue of the current international law.'⁷¹

Therefore, the Spanish legislation on this topic – particularly the Canaries Waters Law – does not have a clear effect and, in any case, that effect would only be relevant to the hypothetical internal waters, but not for the purposes of maritime delimitation. Moreover, taking into consideration the geographical configuration of the two eastern islands, Fuerteventura and Lanzarote, which are the relevant coasts for this maritime delimitation because they face the Moroccan coast, the natural features of the islands can have the same effect for the median line between them and Morocco as the drawing of archipelagic baseline. Consequently, the maritime delimitation could be reached here without the need for Spain to draw archipelagic baselines.

3.3 Morocco's perspective

Having explored Spain's position on the drawing of an equidistance line, we now need to consider Morocco's understanding before addressing the State practice of these two countries.⁷² Morocco disagrees with the equidistance line,⁷³ largely arguing that 'the respective configuration of the Moroccan coasts lying opposite the coasts of the Canary Islands, constitutes a relevant circumstance of the geographic type established in Morocco's legislation that allows Morocco to refuse the application of the equidistance method.'⁷⁴ Thus, Morocco argues that the concavity of its coast should moderate the equidistance line on the basis of, *inter alia*, the ICJ's judgement in the *North Sea Continental Shelf*

69 Inmaculada González García, 'Archipelagos and islands' 2017 21 SYbIL <www.sybil.es/archive/vol-21-2017/> accessed 21 June 2018.

70 Translation by the author.

71 Translation by the author.

72 Saïd Ihrari (n 6) 199-225.

73 Siham Zebda, 'Cuestiones jurídicas en torno a la delimitación marítima entre Marruecos y España en la fachada atlántica' (DPhil thesis, University of Cádiz 2017) 288-326.

74 Abdelkader Lahlou, *Le Maroc et le Droit des pêches maritimes* (LGD 1983) 310-12 [translated from French to English by the author].



case.⁷⁵ Nonetheless, the ICJ's judgement related to a delimitation between States with adjacent coasts, the conclusions of which cannot be extended to a delimitation between States with opposite coasts.⁷⁶ Moreover, the concavity starts just north of the relevant area and, in this case, the concavity does not result in a cut-off effect. Regarding these two points, the findings of ITLOS in the *Bangladesh/Myanmar* case stand in opposition to Morocco's arguments since the Tribunal declared that 'for a coast to be considered as relevant in maritime delimitation it must generate projections which overlap with those of the coast of another party';⁷⁷ hence, 'in the delimitation of the exclusive economic zone and the continental shelf, concavity *per se* is not necessarily a relevant circumstance'.⁷⁸

In addition, Morocco supports its argument based on the natural prolongation of its continental shelf, which is longer than that of the Canary Islands.⁷⁹ Indeed, as a result of their volcanic origin, the Canary Islands have a shorter continental shelf in the geographic sense, especially in comparison to Morocco's continental shelf, which stretches close to the islands.⁸⁰ However, Article 76(1) UNCLOS allows a State to declare a continental shelf of 200 NM even if it is shorter geographically-speaking. Thus, Morocco's argument is unfounded and cannot prevent consideration of the median line either as the equidistance line or the equitable boundary.

3.4 Negotiations and the hypothetical tacit agreement

Despite the clearly different positions of Spain and Morocco regarding the maritime delimitation between Morocco's Atlantic coast and the Canary Islands, there have been negotiations between them to reach an agreement in order to delimit a common maritime boundary for the EEZ and the continental shelf. As mentioned above, after the Perejil incident,⁸¹ the two States initiated talks with this topic as one of their main goals. Since the first meeting in 2003, the working group in charge of the talks have met eight times to discuss negotiations regarding the maritime boundary in the area around the Canary Islands north of the boundary between Morocco and Western Sahara.⁸²

75 *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, para 89.

76 Also relevant here are international decisions dealing with maritime delimitations between opposite coasts, such as: *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Application to Intervene) (Judgment) [1984] ICJ Rep 3; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Judgment) [1993] ICJ Rep 38; (*Qatar v Bahrain*) (n 63); and *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624.

77 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment, 14 March 2012) ITLOS Reports 2012, 4, para 198.

78 *ibid* para 292. ITLOS added in the same paragraph that 'however, when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result.'

79 Felipe Baeza Betancort, 'La delimitación de los espacios marítimos entre Canarias y Marruecos' (2013) 59 AEA 867, 881.

80 Vicente Jesús Navarro Marchante, 'Problemática jurídica sobre la delimitación de los espacios marítimos del archipiélago canario (a propósito de la Ley 44/2010)' (2011) 80 RDP 149, 173.

81 See (n 11) above on the Perejil incident.

82 The boundary between Morocco and Western Sahara is located in the parallel of latitude 40° 27' and hence the area to be delimited between Spain and Morocco is in a northbound direction of that parallel. See Vitoriano Ríos Pérez, 'Islas o archipiélago? antecedentes e iniciativas parlamentarias sobre la delimitación del Mar de Canarias' (*Islas o Archipiélago*, July 2007) <<http://islasoarchipiélago.com/>> accessed 21 June 2018.



As noted by Professor Espósito Massicci, there is neither official data published by the governments nor unambiguous information about the conclusions of this working group.⁸³ However, it seems clear that during the fourth meeting of the working group, which took place on 15 July 2003, both States agreed to draw a provisional *equidistance median line* between the coasts even though in a package deal context. That is to say, the agreement would not be final until all the agreements would be accepted and formalised by an international treaty.⁸⁴ The agreement thus failed in principle because, after that meeting, the States did not agree to turn it into a treaty. The last meeting of the working group was on 10 October 2005 in Madrid, and both parties blamed the other for not continuing with the negotiations.⁸⁵ Arguably, responsibility for the failure of these negotiations largely rests with Morocco since they were based on an alternation principle and, accordingly, the following meeting should have been convened by Morocco – but it was not.

Notwithstanding the lack of a treaty, which would have made the agreement on the provisional median line official, there is still a discussion to be had as to whether both States are *de facto* respecting that median line in their respective State practice. In this regard, the hydrocarbon concessions given by both governments to certain oil companies in order to research the existence of oil fields in the subsoil between the Atlantic coast of Morocco and the Canary Islands are relevant. If the States have authorised the mentioned concessions to explore their subsoil just between their coasts and that provisional median line, it may mean that they are accepting – tacitly and *de facto* – the binding character of that line as the maritime boundary between them.⁸⁶ Nevertheless, in the *Ghana/ Côte d'Ivoire* case, the ITLOS Special Chamber stated that

the oil practice, no matter how consistent it may be, cannot in itself establish the existence of a tacit agreement on a maritime boundary. Mutual, consistent, and long-standing oil practice and the adjoining oil concession limits might reflect the existence of a maritime boundary, or might be explained by other reasons.⁸⁷

In this sense, in December 2001, the Spanish government (by Royal Decree 1462/2001⁸⁸) authorised the oil company Repsol to research the existence of oil fields in an area located 5 NM from Fuerte-

83 Carlos Espósito Massicci, 'Sobre el establecimiento de una línea mediana como límite marítimo provisional entre España y Marruecos frente a las costas de las Islas Canarias' (2005) 13 RJUAM 91, 92-93.

84 The Spanish Government answer to the member of the parliament, Paulino Rivero Baute, about the reasons for not informing the Canaries Government about the drawing of a provisional median line during the seventh meeting of the work group (that took place on 26 October 2004) BOCG num 284, 31 October 2005.

85 Juan Domingo Torrejón Rodríguez (n 39) 225.

86 Philippe Gautier, 'Conduite, accord tacite et délimitation maritime', in Société Française Pour Le Droit International (ed), *Droit des frontières internationales* (Pedone 2016) 145-50.

87 *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Judgment, 23 September 2017) ITLOS Reports 2017, to be published, para 215 <www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf> accessed 22 June 2018.

88 Real Decreto 1462/2001, de 21 de diciembre, por el que se otorgan los permisos de investigación de hidrocarburos, BOE num. 20, 23 January 2002 <www.boe.es/buscar/doc.php?id=BOE-A-2002-1363> accessed 22 June 2018.



ventura (in the territorial sea) and 10 NM from Lanzarote (in the contiguous zone).⁸⁹ These Spanish concessions were hardly protested by Morocco through a *note verbale* sent to the Spanish Embassy in Rabat on 31 January 2002.⁹⁰ Nevertheless, such protests took place before the negotiations of the provisional median line and thus cannot be viewed as a rejection of that line by Morocco.

More recently, in March 2012, Spain authorised (by Royal Decree 547/2012⁹¹) hydrocarbon prospecting in the maritime area between 5 NM and 43 NM from Lanzarote and Fuerteventura⁹² – that is, after the negotiations of the provisional median line. Importantly, Morocco did not protest these new concessions in the same area thereby changing its previous reaction in relation to the earlier concessions. Moreover, Morocco has authorised prospecting in this area several times since then, the last occurring in Tarfaya at the end of 2017.⁹³ In all of these authorisations, the licences issued by Morocco were for places between the Moroccan coast and the provisional median line negotiated in 2003 to delimit the EEZ and the continental shelf.⁹⁴ Nonetheless, as declared by the ITLOS Special Chamber in *Ghana/Côte d'Ivoire*, ‘proof of the existence of a maritime boundary requires more than the demonstration of longstanding oil practice or adjoining oil concession limits.’⁹⁵

Remarkably, in the *Ghana/Côte d'Ivoire* case, the Special Chamber observed ‘that States often offer and award oil concession in an area yet to be delimited’ and usually ‘align their concession blocks with those of their neighbouring States so that no areas of overlap arise.’⁹⁶ In this regard, the Special Chamber declared that ‘to equate oil concession limits with a maritime boundary would be equivalent to penalizing a State for exercising such caution and prudence.’⁹⁷ Thus, it would run contrary to

89 Millán Requena Casanova, ‘España concede a la empresa Repsol YPF permisos de investigación de hidrocarburos en aguas situadas, en aplicación del método de la equidistancia, más allá del mar territorial de las islas Canarias frente al litoral marroquí’ (2002) 54 REDI 501.

90 In that verbal note Morocco said, between other clarifications, ‘selon les normes du Droit International coutumier, la délimitation du plateau continental est effectuée par voie d'accord, dans le but de parvenir à une solution équitable. Au cas où les Etats concernés ne parviennent pas à conclure un accord définitif, ils procèdent à des arrangements provisoires de caractère pratique, qui sont sans préjudice de la délimitation finale. Ainsi, sur le plan procédural, l'accord des deux pays est donc incontournable pour délimiter, à titre définitif ou provisoire, le plateau continental.’ The full text of the verbal note was published by Morocco’s official news agency (MAP) on 31 January 2002.

91 BOE num 69, 21 March 2012 <www.boe.es/diario_boe/txt.php?id=BOE-A-2012-3935> accessed 22 June 2018. This *Real Decreto* came to ratify the previous one (*Real Decreto* 1462/2001, 21 December 2001) that was annulled by the Spanish Supreme Court (*Tribunal Supremo*) on 2004, with the following stop of the prospecting, because it did not comply with Spain’s environmental law, by a previous judgement of the Spanish Supreme Court, i.e. *Sentencia de la Sección tercera de la Sala de lo Contencioso-Administrativo del Tribunal Supremo, del 24 de febrero de 2004*.

92 Cabildo de Lanzarote, ‘Argumentario general sobre las prospecciones petrolíferas en Canarias’ (*Datos de Lanzarote*, 3 January 2013) 4 <www.datosdelanzarote.com/uploads/doc/Argumentario-sobre-las-prospecciones-petrol%C3%ADferas-en-Canarias-20130222093835965propetrol.pdf> accessed 22 June 2018.

93 RLP, ‘Marruecos adjudica a ENI prospecciones de petróleo frente a Canarias’ ABC (Las Palmas de Gran Canaria, 29 December 2017) <www.abc.es/espana/canarias/abci-marruecos-adjudica-prospecciones-petroleo-frente-canarias-201712281123_noticia.html> accessed 22 June 2018.

94 Rafael García Pérez, ‘Las prospecciones petrolíferas en aguas canarias y su impacto en las relaciones hispano-marroquíes’ (2012) 13 REIM <<https://revistas.uam.es/index.php/reim/article/view/894/882>> accessed 22 June 2018.

95 *Ghana/Côte d'Ivoire* (n 87) para 215.

96 *ibid* para 225.

97 *ibid*.



Articles 74(3) and 83(3) of UNCLOS and 'it would also entail negative implications for the conduct of States in the area to be delimited elsewhere.'⁹⁸

Nonetheless, to be clear, according to the jurisprudence of ITLOS, the hydrocarbon practice alone is not enough to prove the existence of a tacit agreement on the maritime boundaries; the tacit agreement would have to be substantiated through other types of State practice, such as fishing activities, marine environment protection, migration control or any activity other than hydrocarbons, which could demonstrate the State's conduct in relation to the line tacitly *agreed to*. In fact, the existence of a tacit agreement in the context of maritime delimitation has been accepted by international jurisprudence, concretely in *Peru v Chile*, in which the ICJ recognised a tacit agreement in the context of a previous proclamation and declaration,⁹⁹ which 'the Parties reached concerning the extent of their maritime boundary.'¹⁰⁰

In view of the foregoing, the respect given to the median line – located in the Atlantic Ocean between the coasts of Morocco and Spain's Canary Islands – by both States in their respective hydrocarbon activities' practice is not enough to assume the existence of a tacit agreement between the two countries accepting that line as their maritime boundary.

3.5 Possible relevant circumstances and the median line

As previously discussed, the two opposite coasts of Spain and Morocco in the Atlantic Ocean must be delimited – preferably by a single maritime boundary for the EEZ and the continental shelf. The relevant coasts in this delimitation are, on the one side, the eastern coasts of Gran Canaria, Fuerteventura and Lanzarote and, on the other side, the western Atlantic coast of Morocco at the points where they overlap with those of the coast of Spain in the Canary Islands.

From the baselines, a provisional median line based on a pure equidistance approach can be drawn. Following the three-stage method, it is necessary to consider whether there are relevant circumstances to adjust that provisional median line. The three main circumstances argued by Morocco – namely, the longer extension of its continental shelf, the greater length of its coast, and the concavity of its coast – should be rejected. In fact, these circumstances lack sufficient relevance in terms of adjustment of the provisional median line for the following three reasons. Firstly, regarding the longer extension of Morocco's continental shelf: logically, in geographic terms, the continental shelf generated by a continent is longer than that generated by volcanic islands; nevertheless, Article 76(1) UNCLOS applies equally to both States and entitles each to claim a continental shelf. Secondly, regarding the greater length of Morocco's coast: the entirety of Morocco's Atlantic coast cannot be taken into account; rather, only the relevant coast can be considered, and, in this case, the lengths of the relevant coasts do not differ significantly. Thirdly, regarding the concavity of the coast of Morocco: the concavity, which only starts in the area of the relevant coasts and is greater to the north of this area, does not apply in delimitations of opposite coasts (in contrast to the delimitation of adjacent coasts) and

98 *ibid.*

99 *Maritime Dispute (Peru v Chile)* (Judgment) [2014] ICJ Rep 3, 41, para 102.

100 *ibid* para 103.



does not produce any cut-off effect that could justify an adjustment of the median line in order to reach an equitable result.

Therefore, the maritime boundary delimitation between Spain and Morocco could be carried out by bilateral negotiations or it could be decided by an international court or tribunal in a hypothetical delimitation case between Spain and Morocco. In relation to the latter, even if that international adjudicating body would not accept the existence of a tacit agreement, there is no reason to adjust the median line between the relevant coasts of the Canary Islands and Morocco's Atlantic coast. Consequently, the maritime boundary in this area should be, in any case, the median line.

4. Conclusion

The conclusion of the pending maritime delimitations between Morocco and Spain both in the Alboran Sea and the Atlantic Ocean are, despite the associated difficulties, critical to solving the current disputes and to avoid the development of new disputes between the two countries. In terms of current disputes, reaching an agreement – or a decision issued by an international adjudicating body, even though this option would be complicated in light of the States' declarations – delimiting the maritime boundaries between Spain and Morocco would settle the associated sovereignty issues, since the agreed maritime boundary would require clarification of which State possesses full control over the territory in question in order to define the pertinent maritime entitlements. In terms of new disputes, these could arise as a result of the living (mainly fisheries) and non-living (especially hydrocarbon fields) resources existing in the Alboran Sea and the Atlantic Ocean, which, due to the lack of a delimited maritime boundary, could trigger claims by both States over those undelimited and disputed maritime areas and could even lead to serious disputes like the Perejil Incident.

Moreover, the sovereignty issues are also the main causes of the lack of delimitation – particularly in the Alboran Sea, but also in the Atlantic Ocean – and must be overcome in order to reach an agreement establishing the maritime boundaries between the two States. In addition, a different method of delimitation is argued by each State (equidistance in the case of Spain and equity in the case of Morocco) and, as such, the different conceptions of the effect that ought to be given to the *relevant* circumstances hinder the achievement of a possible agreement. Nevertheless, the existence of negotiations between the two countries aimed at reaching such an agreement and the momentum of the bilateral relations demonstrate that, in the not-too-distant future, an agreement on maritime boundaries could be reached. In this sense, the negotiated median line for the Atlantic Ocean leads the way for future negotiations even though that line, and the hydrocarbon activities carried out in that area, cannot be understood as a tacit delimitation agreement.

Finally, regardless of when the negotiations will be resumed, it seems that there is no reason to adjust the median line in the Atlantic Ocean between Spain (Canary Islands) and Morocco. However, regarding the delimitations in the Alboran Sea, the particularities of each Spanish enclave in North Africa should be duly considered – hence, modifying and reducing the respective maritime areas as appropriate – in order to facilitate achievement of the pending maritime delimitations between Spain and Morocco.

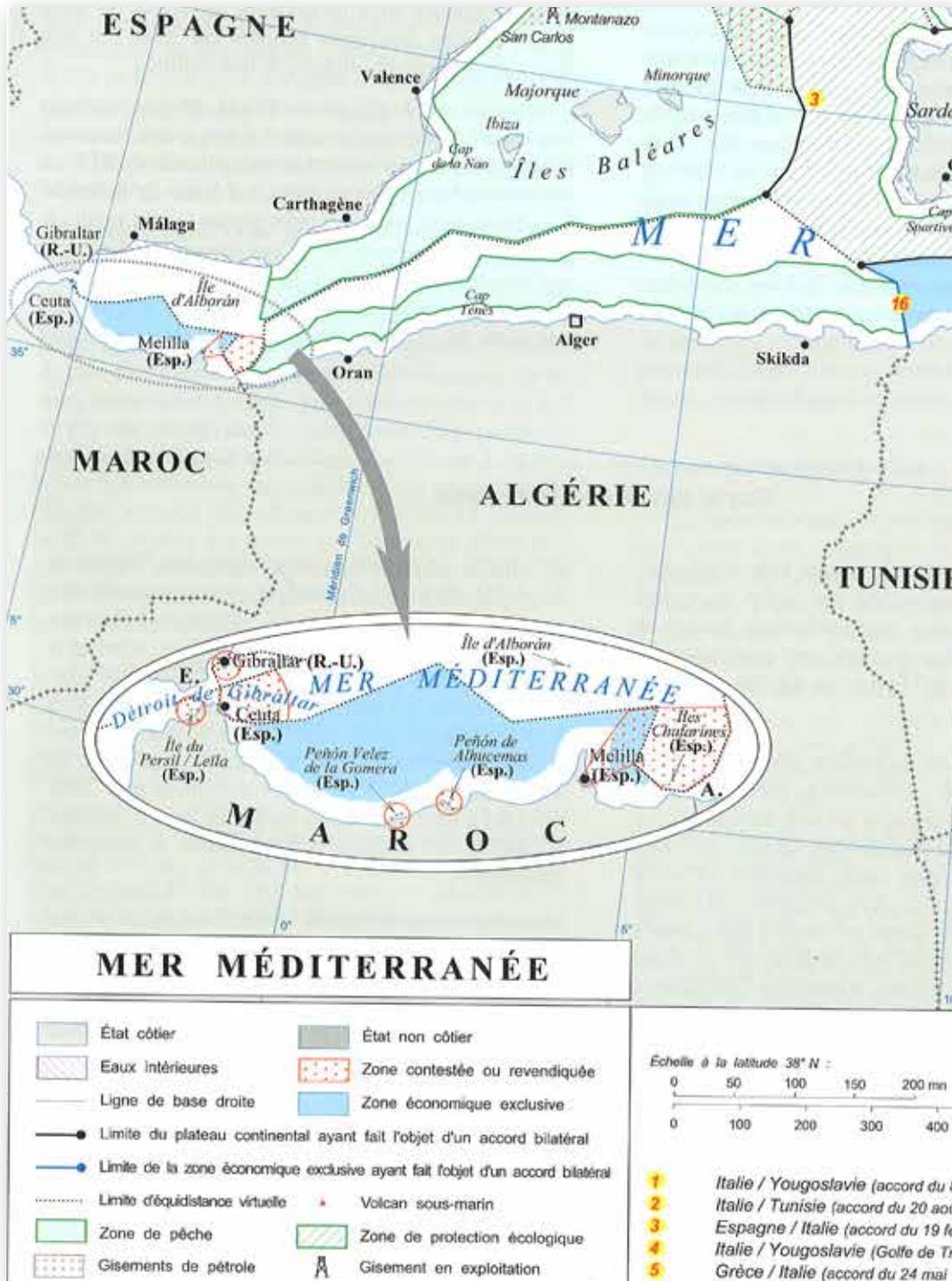


Figure 1 – Map of the maritime areas pending delimitation between Spain and Morocco in the Alboran Sea with the Spanish enclaves pointed out: Didier Ortolland and Jean-Pierre Pirat, *Atlas géopolitique des espaces maritimes: frontières, énergie, transports, piraterie, pêche et environnement* (2nd edn, Technip 2010) 86.

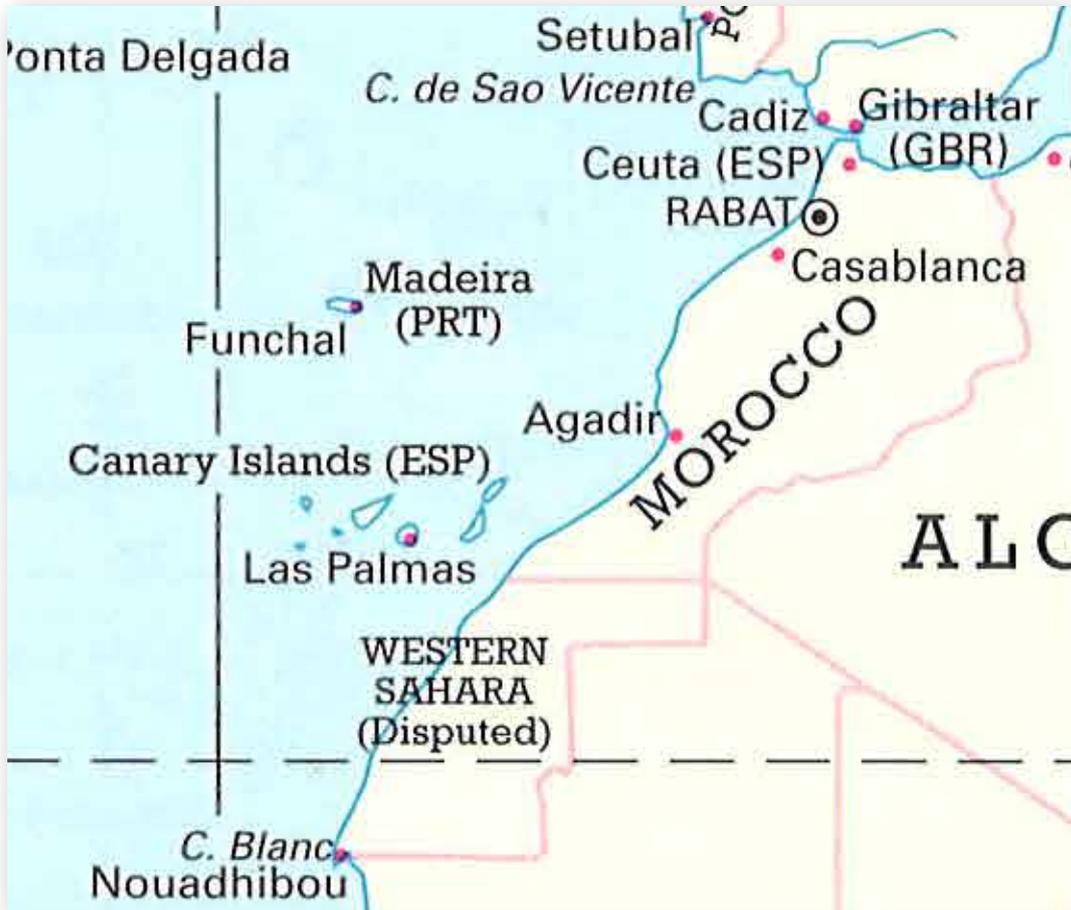


Figure 2 – Map of Spain and Morocco in the Atlantic Ocean: *Lloyd's Maritime Atlas of World Ports and Shipping Places* (Colchester, LLP Ltd 1999) 10.